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A truly unprecedented set of events has returned this case to the Court. On October 4, 2004, Michael Ross declared that he wanted to forgo further post-conviction remedies so the state could proceed with his execution. The trial court, *Clifford, J.,* set his execution date for January 26, 2005. Since October 4, 2004, Michael Ross has been found competent to forgo his post-conviction remedies by a state trial court, *Clifford, J.,* a state habeas court, *Fuger, J.,* a United States District Court, *Droney, J; Ross v. Rell,* 2005 U.S. Dist. LEXIS 245, 12 (2005); and in a unanimous decision of this Court. *State v. Ross*, 272 Con. 577 (2005). This Court's ruling was challenged in a collateral action filed in federal district court pursuant to 28 U.S.C. § 2254. That court, *Chatigny, J.*, was the first to harbor any doubts about the defendant's competency to forgo his discretionary appeals. Judge Chatigny[1] granted a stay of the January 26 execution and ordered a full evidentiary hearing to determine whether Ross was competent to forgo his discretionary post-conviction remedies. *Ross v. Rell*, 2005 U.S. Dist. LEXIS 908 (2005). Although that stay was affirmed by the United States Court of Appeals for the Second Circuit; *Ross v. Rell*, 396 F. 3d 512 (2005); the United States Supreme Court reversed both lower courts when it vacated the stay on January 27, 2005 at approximately 5:30 p.m.. *Lantz v. Ross*, U.S. , 125 S. Ct. 1117 (2005). That ruling implicitly upheld this Court's finding of competency in *State v. Ross*, 272 Conn. 577 (2005) (Writ I or First Writ). The execution was rescheduled for January 29 at 2:00 a.m..

In a parallel action pursuant to 42 U.S.C. § 1983, Judge Chatigny issued a temporary restraining order preventing the execution. That restraining order was vacated by the Second

[1] Judge Chatigny and Judge Droney are referred to by name here to distinguish between the two federal district court judges who reached divergent results on the same issue.

Circuit Court of Appeals on Friday, January 28, at approximately 2:30 p.m. *Ross v. Rell*, 398 F. 3d 203 (2005). That court, however, granted the plaintiff in that case a temporary stay until Sunday, January 30, to file an appeal to the United States Supreme Court. *Id.* The United States Supreme Court vacated that stay at approximately 10:30 p.m. on Friday, January 28, thus eliminating all legal obstacles to the defendant's execution.

On Friday January 28 at approximately 3:30 p.m., Judge Chatigny convened a teleconference with all the lawyers involved in both matters. He invited Ross's Attorney, T.R. Paulding, who had not formally appeared in either federal case, to participate. There were no motions pending before Judge Chatigny's court at that time. During this teleconference, Judge Chatigny created an untenable conflict of interest for Attorney Paulding. Consequently, he was unable to advise Ross during the night of the scheduled execution. T. 2/3/05 at 33-35. Just hours before it was scheduled to take place, Attorney Paulding asked to postpone the execution due to a possible conflict of interest. The state postponed the execution until January 30, the last day authorized by the death warrant. Ultimately, the state and the defendant moved for a stay of execution that was granted by this Court and the death warrant expired.

Thereafter, Attorney Paulding moved to "reopen" the competency hearing Judge Clifford had held in December, 2004. The state filed a motion to determine the extent of the conflict identified by Attorney Paulding on the morning of the execution. To ameliorate the conflict, the parties (the state and Ross) agreed to have Attorney Thomas Groark appointed as special counsel to the trial court to advocate in any future hearing that Ross was not competent. The competency finding was "reopened" and proceeded to a full evidentiary hearing that was held from April 7 until April 14,

2005. On April 22, 2005, the trial court found yet again that Ross was competent to forgo his post-conviction remedies and accept his execution. Memorandum of Decision ("Mem Dec.") at 21-22.[2]

Special counsel filed the instant writ of error and appeal on April 29, 2005 and also sought permission to act as special counsel in this Court to prosecute these actions. The state objected to special counsel's motion and moved to dismiss both actions because they failed to invoke the subject matter jurisdiction of this Court. [3]

ARGUMENT

I. THE TRIAL COURT'S FINDING THAT MICHAEL ROSS IS COMPETENT TO FORGO FURTHER REVIEW OF HIS DEATH SENTENCE IS NOT CLEARLY ERRONEOUS.

In *Rees v. Peyton*, 384 U.S. 312, 313-14, 86 S. Ct. 1505, 16 L. Ed. 2d 583 (1966), the United States Supreme Court established the standard for determining the mental competence of a capital defendant who chooses to abandon post-conviction litigation and accept the imposition of his death sentence: "whether he has the capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." This Court first applied the *Rees* standard in *State v. Ross*, 272 Conn. at 598-602, and, based on that standard, the Court rejected the public defender's first writ of error after concluding it did not have standing as next friend to represent Michael Ross because it had not presented any "meaningful evidence" of incompetence that would have entitled

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[2] Mem Dec. refers to the trial court's memorandum of decision of April 22, 2005.

[3] Per this Court's order of May 2, 2005, the substance of these motions will not be repeated here.

it to an evidentiary hearing under *Demosthenes v. Baal*, 495 U.S. 731, 736, 110 S. Ct. 2223, 109 L. Ed. 2d 762 (1990). *State v. Ross*, 272 Conn. at 611. The United States Supreme Court upheld this Court's application of *Rees. Lantz v. Ross,* U.S. , 125 S. Ct. 1117, 160 L. Ed. 2d 1091 (2005). Thus, this Court's application of *Rees* is the law of the case. *See State v. Ross*, 269 Conn. 213, 262, 849 A.2d 648 (2004).

Accordingly, in deciding for a second time whether Michael Ross is competent to forgo further review of his death sentence, the trial court, *Clifford, J.*, was bound to apply the *Rees* standard to the evidence presented at the re-opened competency hearing. The trial court applied *Rees*, but it did so by employing a "modified" version of the three-prong inquiry set forth in *Rumbaugh v. Procunier*, 753 F.2d 395, 398-99 (5th Cir.), *cert. denied*, 473 U.S. 919, 105 S. Ct. 3544, 87 L. Ed. 2d 668 (1985), which, though framed in slightly different terms, is consistent with the requirements of *Rees*. *See* Mem Dec. at 5-6. The trial court's competency determination should be upheld because the evidence presented at the hearing was more than sufficient to demonstrate that Ross's mental diseases, disorders or defects do not substantially affect his ability rationally to choose to forgo further review of his death sentence and accept his punishment.

A. The Trial Court's Competency Determination Is A Factual Question Subject To The "Clearly Erroneous" Standard Of Appellate Review.

Whether a capital defendant is competent to forgo post-conviction review of his death sentence is a question of fact. *See Demosthenes v. Baal*, 495 U.S. at 735 (recognizing that state court's conclusion that capital defendant is competent to forgo post-conviction review is "factual issue" entitled to presumption of correctness by federal habeas court); *Maggio v. Fulford*, 462

U.S. 111, 117, 103 S. Ct. 2261, 76 L. Ed. 2d 794 (1983) (same).[4] In applying *Rumbaugh*'s three-part inquiry, the trial court modified the third prong as follows: "If Michael Ross is suffering from a mental disease, defect or disorder, which does not *substantially affect* his understanding of his legal position and the options available to him, does that disease, defect or disorder, nevertheless, *substantially affect* Michael Ross' ability to make a rational choice among his options?" Memorandum of Decision ("Mem Dec.") at 6 (emphasis added); *compare Rumbaugh v. Procunier*, 753 F.2d at 398 ("If the person is suffering from a mental disease or defect which does not *prevent* him from understanding his legal options available to him, does that disease or defect, nevertheless, *prevent* him from making a rational choice among his options?") (emphasis added). *Rumbaugh*'s third prong is "essentially a factual question." *Id*. at 399.

Accordingly, this Court's review is limited to whether the trial court's finding that Michael Ross is competent was "clearly erroneous." *See State v. Colon*, 272 Conn. 106, 281-82, 864 A.2d 666 (2004). A finding of fact is clearly erroneous when there is no evidence in the record to support it, or where there is evidence to support it but the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Pandolphe's Auto Parts, Inc. v. Manchester*, 181 Conn. 217, 221-22, 435 A.2d 24 (1980). In applying this standard, this Court cannot retry the facts nor can it pass on the credibility of witnesses. *See State v. Quinet*, 253 Conn. 392, 407-08, 752 A.2d 490 (2000). "It is in the sole province of the trier of

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[4] *See also Massie v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001) (per curiam) (district court's finding of competence, under *Rees v. Peyton*, 384 U.S. 312, 313-14 (1966), is factual determination that must be upheld on appeal unless "clearly erroneous"); *Lonchar v. Zant*, 978 F.2d 637, 640 (11th Cir. 1992) ("Whether Larry Lonchar is competent to forgo collateral review of his conviction is a factual question.") (citing *Rumbaugh v. Procunier*, 753 F.2d 395).

fact to evaluate expert testimony, to assess its credibility and to assign it a proper weight." *State v. Jarzbek*, 204 Conn. 683, 706-07, 529 A.2d 1245 (1987), *cert. denied*, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988). In evaluating a challenge to the trial court's factual findings, the evidence must be construed in a way most favorable to sustaining the court's ruling. *In re Keejam T.*, 221 Conn. 109, 116, 602 A.2d 967 (1992).

Although the trial court erroneously suspended the presumption of competency, that decision does not affect the outcome. Mem Dec. at 4. Nevertheless, unless rebutted, the presumption of competency remains in effect until a prisoner is executed. *See Ford v. Wainwright*, 477 U.S. 399, 426, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) (Powell, J. concurring). Moreover, the presumption does not dissipate based on who is alleging incompetence, whether it be the defendant or a third party. *State v. Ross*, 269 Conn. 213, 271-74 (2004).

B. The Trial Court's Competency Finding Is Not Clearly Erroneous.

1. Case applying *Rumbaugh*

Before addressing the specific evidence supporting the trial court's competency finding in this case, the state will review several cases in which the federal circuit courts of appeal have analyzed the sufficiency of evidence of competence under *Rumbaugh*'s third prong, beginning with *Rumbaugh* itself. In *Rumbaugh*, the Fifth Circuit upheld the district court's finding of competency – i.e. that the defendant's mental disease, disorder or defect did not prevent him from making a rational choice among his options – for several reasons. First and foremost, the testimony and medical reports of the defendant's psychiatrist and the defendant's answers to questions posed by his psychiatrist showed that he was able to "feed relevant facts into a rational

decision making process and come to a reasoned decision" and clearly reflected "his awareness of his legal situation and of his right to file state and federal habeas petitions." *Id.* at 402. In addition, the Fifth Circuit's conclusion that the evidence supported the district court's finding of competency was "reinforced by Rumbaugh's actions after the district court's decision and while the appeal was under advisement" in that he filed "an extremely coherent and well-reasoned *pro se* state habeas corpus petition." The Fifth Circuit summed up its decision as follows:

> Rumbaugh has striven mightily to prove his mental competence to make his legal decisions. He convinced the district court who presided over the dramatic hearings. We cannot tag that finding as clearly erroneous. Nor can we conclude as a matter of law that a person who finds his life situation intolerable and who welcomes an end to the life experience is necessarily legally incompetent to forgo further legal proceedings which might extend that experience.

Id. at 403.

In *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir.), *cert. denied*, 483 U.S. 1033, 107 S. Ct. 3277, 97 L. Ed. 2d 781 (1987), the Eighth Circuit upheld the district court's finding of competency based on the evidence presented at the competency hearing which included the defendant's testimony as well as that of six psychiatrists. *Id.* at 1053. All of the experts agreed, and the district court found, that the defendant suffered from three "mental disorders" as that term is used in *Rees*. *Id.* at 1054-55. Although the six experts generally shared the same opinion as to the existence and nature of the defendant's mental disorders, "they divided into two camps in appraising the relationship between his disorders and his decision to abandon post-conviction proceedings." *Id.* at 1055. On one side, two of the psychiatrists opined that the defendant's "opposition to pursuing his remedies was a direct result of his mental disorders, rather than a product of rational decision making." *Id.* By contrast, the four remaining psychiatrists, two of

whom were State's experts and two of whom were independent, opined that despite the defendant's mental disorders, "his decision was the product of a rational thought process and appreciation of his circumstances." *Id.* Based on the evidence before it, the district court concluded that the defendant's "decision to forgo further legal proceedings was based on an evaluation of his own best interests that the Court, whatever its own view of his choice, could not say was irrational." *Id.* In finding the defendant competent, the district court found the testimony of Dr. Foster, one of the two independent psychiatrists, "particularly helpful" given that "he was not associated with either party, had spent far more time on Smith's case than any of the other experts, had wrestled long with the competency question, and had candidly acknowledged the uncertainties inherent in resolving this question." *Id.*

On appeal, Smith's putative next friend, the public defender, "launch[ed] a number of assaults upon the factual findings underlying the district court's competency determination, arguing, *inter alia* that the district court erred in relying upon the psychiatrists who found Smith competent rather than those who found him incompetent, and in failing to find that Smith irrationally failed to consider all his values and alternatives." *Smith v. Armontrout*, 812 F.2d at 1058. Applying the clearly erroneous standard of review, the Eighth Circuit upheld the district court's competency finding based on ample evidentiary support in the trial record, such as the opinion of Dr. Foster, noting that the assessment and evaluation of conflicting expert testimony is a matter particularly within the fact finder's province. *Id.* In addition, the Eighth Circuit noted that its conclusion was bolstered "by the fact that the district court . . . placed the burden of proof upon the State, rather than the would-be next friend." *Id.*

In *Ford v. Haley*, 195 F.3d 603 (11th Cir. 1999), the Eleventh Circuit upheld the district court's finding of competency based on evidence presented at the competency hearing, which included Ford's testimony, expert testimony by Dr. Rollins, an independent, court-appointed psychiatrist, and a written report filed by Dr. Pincus, a neurologist and professor at Georgetown University retained by the putative next friend, Ford's former attorney. After examining Ford, Dr. Rollins "concluded that Ford's depression and personality disorder [did] not affect Ford's competence to dismiss his federal habeas petition" based upon several "rational reasons" advanced by Ford, including his "feeling that if he would be represented by counsel at a new trial, the result would turn out the same," i.e., that he would once again receive the death penalty. *Id.* at 612-13. Conversely, Dr. Pincus concluded that Ford was not mentally competent to forgo collateral review of his death sentence based, in part, on "the results of a neurological examination of Ford and his psychiatric history" which "indicated brain damage in the right hemisphere of his brain, possibly caused by his premature birth." *Id*. at 614.

Initially, the district court referred the matter to a federal magistrate judge who held a competency hearing and found Ford mentally competent to dismiss his federal habeas petition. *Ford v. Haley*, 195 F.3d at 614. In reaching its decision, the magistrate judge found, among other things, that "Dr. Rollins's testimony is more persuasive than Dr. Pincus's." *Id.*

Subsequently, the district court independently reviewed the trial record and found that Ford was competent to forgo collateral review of his death sentence. *Ford v. Haley*, 195 F.3d at 615. In particular, the district court found that Ford was not incompetent under the third prong of the three-part test set forth in *Lonchar v. Zant*, 978 F.2d 637, 641-42 (11th Cir. 1992), "because he

has rational reasons" for choosing to drop his appeals and be executed: "he is weary of languishing in prison, he is justly pessimistic that he will ever get out of prison, and he believes that he will be happier in the afterlife." *Id.* at 616. Like the magistrate judge, the district court credited Dr. Rollins's opinion and discredited that of Dr. Pincus. *Id.* at 615-16 and n.9.[5]

On appeal, counsel argued "(a) that Dr. Rollins did not adequately consider Ford's specific religious belief that at death he will join the 'Holy Trinity' or his bizarre translation[6] statements, such as how through translation he travels and has many wives and Swiss bank accounts, (b) that Dr. Rollins's evaluations are thus inadequate and unreliable, and (c) that therefore Dr. Rollins's opinions, and the district court's findings relying thereon, are fatally flawed." *Ford v. Haley*, 195 F.3d at 620. The Eleventh Circuit rejected all of these arguments and concluded that "the district court's finding under *Lonchar*'s third prong – that Ford has the ability to make rational choices among his options and has done so – are supported by substantial, reliable evidence." *Ford v. Haley*, 195 F.3d at 622. The Eleventh Circuit found it especially "significant that Dr. Rollins was not hired by the prosecutor, but was the court's neutral psychiatric witness selected from a list of names provided by Ford's counsel." *Id*. at 622.

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[5] In *Lonchar v. Zant*, the Eleventh Circuit held that applying the *Rees* test "involves a determination of (1) whether that person suffers from a mental disease, disorder, or defect; (2) whether a mental disease, disorder, or defect prevents that person from understanding his legal position and the options available to him; and (3) whether a mental disease, disorder, or defect prevents that person from making a rational choice among his options." *Lonchar*, 978 F.2d at 641-42 (citing *Rumbaugh v. Procunier*, 753 F.2d at 398).

[6] "Translation" refers to testimony elicited from Ford in which he indicated that he had the "ability to 'translate' to places outside prison" such as church and heaven. *Ford v. Haley*, 195 F.3d at 613.

In sum, *Rumbaugh*, *Smith* and *Ford* together establish that the trial court is solely responsible for evaluating expert psychiatric testimony, assessing its credibility, assigning it a proper weight and, most important, resolving conflicting opinion when two or more psychiatrists disagree over a prisoner's ability rationally to choose to forgo further review of his death sentence and accept his punishment. *See also*, *State v. Quinet*, *supra*. Furthermore, in resolving conflicting medical opinions, the testimony of an "independent" court-appointed psychiatrist is often considered more reliable. Finally, when the prisoner himself testifies and is able to articulate rational reasons for dropping further appeals, and there is substantial medical evidence indicating that the prisoner's mental disease, disorder or defect, whatever its nature, does not substantially interfere with his ability to understand his legal options and rationally chose among them, the trial court's decision is not "clearly erroneous" and must be upheld on appeal.

2. The trial court's decision is not "clearly erroneous" because it is based on ample evidence that Ross's mental disorders do not substantially affect his ability rationally to choose to forgo further review of his death sentence and accept his punishment.

The evidence presented at the competency hearing included the expert opinion of four psychiatrists[7], the testimony of one legal expert, the testimony of three fact witnesses, the testimony of Michael Ross himself, and voluminous documentary evidence covering the past twenty years. After carefully reviewing the entire trial record, the trial court found by a preponderance of the evidence that Michael Ross is in fact mentally competent to choose to forgo

[7] Dr. Michael Norko had been appointed by the court to examine Ross in 1995, 2004 and again in 2005. Dr. Suzanne Gentile was retained by Attorney Paulding, and Drs Stuart Grassian and Robert Goldsmith were retained by special counsel.

further review of his death sentence and accept his punishment.[8] Specifically, the trial court found that none of Ross's mental disorders, taken individually or together, "substantially affect his understanding of his legal position and the options available to him," nor do they "substantially affect his ability to make a rational choice among his options." Mem Dec. at 21. Additionally, the trial court found that Ross's decision to forgo further post-conviction review of his death sentence is knowing, intelligent and voluntary. *Id.*

The trial court's competency determination is based on many detailed subordinate factual findings, but the court's overall finding of competency can be subdivided into three principal components, which the state will address in the following order: (1) the trial court's finding that Michael Ross's reasons for choosing to abandon further review of his death sentence and accept his punishment are the product of a rational mind; (2) the trial court's finding that "death row syndrome" played no part whatsoever in Ross's decision to forgo further review of his death sentence; and (3) the trial court's decision to credit the medical opinions of Dr. Norko and Dr. Gentile, and to discredit the contrary opinions of Dr. Grassian and Dr. Goldsmith.

First, Michael Ross's own testimony supports the trial court's finding that Ross's decision to accept his punishment is the product of a rational thought process, and the trial court made a specific finding crediting Ross's testimony. Mem Dec. at 21. Ross testified that he has many reasons for wishing to forgo his appeals. T. 4/8/05 at 32.

> It's not clear cut. There's different things I feel at different times. It's no one simple answer to this. It's a very complicated thing, a decision that I came to over a period of years. There's times when I'm depressed and I would just as soon be executed. There's times when I'm feeling good and I'm more concerned about other people.

[8] On December 28, 2004, the trial court found that Ross is competent beyond a reasonable doubt.

> There's times when I have a hearing going up and I'm feeling increasingly anxious about the hearing and I don't want to be here. . . So, there's more than one reason. I think there's a list of pros and cons to any decision.

T. 4/8/05 at 32.[9] Ross testified that, "I do feel trapped, that I'm in this of my own making. But, it's things that I did 25 years ago." *Id.* at 147.

In addition to Ross's testimony, the trial court relied on statements that Ross repeatedly had made dating back to 1987 clearly expressing his desire to spare the victims' families from having to relive the horror of his crimes at another death penalty hearing, which would be the outcome of any successful appeal or collateral attack on his death sentence. Mem Dec. at 11, state's exhibit 8; T. 4/13/05 at 144. The trial court found that, between 1994 and 1998, Ross, in attempting to stipulate to the death penalty, repeatedly had expressed his desire to spare the victims' families the emotional pain and suffering they would be forced to endure at yet another penalty hearing, even though Ross himself continued adamantly to maintain that his sexual sadism should have mitigated his crimes and resulted in a sentence of life in prison without release, rather

[9] Ross's testimony regarding his reasons for forgoing his appeals was corroborated by several other witnesses. Dan Ross testified that he believes that Ross does not want to put the families through another penalty hearing, and that Ross himself does not want to go through another penalty hearing. T. 4/8/05 at 11. His girlfriend, Susan P., testified that Ross gave three reasons for his decision: avoiding pain for the families, avoiding the unpleasantness for himself of another penalty hearing, and avoiding continued imprisonment. T. 4/9/05 at 92-93. Martha Elliot testified that Ross's decision "has many different facets to it": because "he does not like to sit in court and listen to what he's done because he's ashamed of it, [and] it gives him a lot of guilt," he doesn't want the families to have to go through another hearing, he doesn't believe his mental illness will ever be recognized, he doesn't believe he'll ever get a life sentence, he doesn't want to continue to live in prison, and because it's the moral thing to do. T. 3/24/05 at 20-22, 33, 51, 53-56. Dr. Gentile testified that Tom Latier, Ross's psychiatric social worker, described Ross's reasons as similarly multifaceted: "his desire to look more like a martyr and be remembered in a book. . .[he's] tired of living under the death sentence, watching fellow inmates grow old. He also had seen himself as a moral person that gained a moral sense over the last 20 years, and wanted to move to beyond what he did as far as committing the crimes and wanted to move on to another way of looking at the world and being sorry." T. 4/12/05 at 21.

than the death penalty. *Id.* at 13-14. The court also found that Ross believed then, and continues to believe to this day, that the "morally right" choice is to accept the determination of two different juries that he deserves to die for his crimes rather than contest the penalty in another hearing. *Id.* at 14. Ross's multiple motivations for wanting to forgo his appeals were reinforced by Dr. Norko, who had interviewed Ross and opined that he has "two sets of motivations":

> The primary motivations for forgoing any appeals and accepting the death penalty are 1) that is morally the right thing to do, and 2) a desire to save the families of the victims the pain of going through another penalty hearing. The secondary reasons, which Ross calls the "fringe benefits" of his decision, are 1) that he would avoid his own pain from hearing the evidence at another penalty hearing, 2) that he would end his confinement and not grow old in prison, and 3) accepting the inevitability of receiving the death penalty.

Mem Dec. at 14-15, T. 4/7/05 at 80-81, 101-04, 144-46. Based on Dr. Norko's opinion, the trial court found that all of Ross's stated motivations "come together in his decision and this multifaceted aspect of his decision demonstrates his ability to think rationally." *Id.* Also, the trial court relied on the fact that Ross has wrestled with this most difficult decision for years. T. 4/7/05 at 101. Based on Dr. Gentile's expert opinion, the court concluded that "such internal strife" and mixed emotions "are part of any tough decision. Ambivalence and doubt over his decision is a sign that [Ross] is a rational person." Mem Dec. at 14-15, T. 4/12/05 at 41, 43-44.

In addition to Ross's stated reasons for wanting to give up further attacks on his death sentence, the trial court found that evidence of the so-called "death row" syndrome "never materialized" in this case. Indeed, the trial court found that death row syndrome proved to be total non-factor in Ross's decision making. Mem Dec. at 15-17, T. 4/7/05 at 53-54, 73-75.[10]

[10] In fact, both Dr. Norko and Dr. Gentile testified that "death row syndrome" and "SHU (continued...)

Specifically, the trial court relied on the opinion of Dr. Gentile, who personally examined the conditions of Northern Correctional Institution and found that the segregated units were "clean, quiet, well organized, and more conducive to a better life than those in other prisons she had seen." *Id.* at 16. T. 4/12/05 at 26-29. While living in a segregated housing unit in Northern, Ross "had access to television, radio, visitors, daily telephone privileges and even Nintendo's 'Game Boy.'" *Id.* at 16; T. 4/7/05 at 52-55; T. 4/12/05 at 26-29, 99; T. 4/8/05 at 115-119. In addition, Ross had been out of his cell more than other death row inmates because he was the "tier man" on death row; he was able to establish a "recreational" library for the inmates and actively managed it; and he had many interviews and visitors and received many letters and publications while on death row at Northern. *Id.* Even Dr. Grassian and Dr. Goldsmith acknowledged these were the conditions of Ross's confinement. *Id.* at 17; T. 4/13/05 at 84-94; T. 4/11/05 at 31-34.[11]

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[10](...continued)
syndrome" are not terms that are widely accepted in the mainstream of psychiatric literature, the only articles on the "syndromes" are those authored by Dr. Grassian, and that those "syndromes" are only found with regularity in legal literature. T. 4/7/05 at 112; T. 4/12/05 at 29, 32. Dr. Goldsmith also testified that Dr. Grassian is "mostly" the only person who has written articles about "death row syndrome." T. 4/13/05 at 75.

[11] Dr. Goldsmith testified that Ross had access to television, radio, visitors, daily telephone privileges, indoor and outdoor recreation, and video games; that Ross was the "tier man" which meant "he would be outside his cell sweeping, mopping, cleaning, organizing the library carts, the library area and get paid for it;" that he was responsible for the library which "was a job he took pride in, something that was - - something that he saw as a way to keep himself busy and active on death row;" that Ross complained about the conditions in New York as compared to Connecticut and wanted to come back to Connecticut; and that Ross had many interviews and visitors. T. 4/13/05 at 88-94. Dr. Grassian testified that Ross had television, a radio, a window, outdoor recreation, was friends with some of the other inmates, and has "succeeded in having more visits and more people willing to continue to visit him over time than most inmates." T. 4/11/05 at 31-34

This testimony was in stark contrast to Dr. Grassian's testimony elsewhere, that Ross is
(continued...)

Accordingly, the trial court concluded that Ross's desire not to prolong his stay in prison by continuing to challenge his death sentence is due to the *fact* of confinement, and not the *conditions* of confinement. Mem Dec. at 17; T. 4/8/05 at 147. Furthermore, in rejecting the notion that death row syndrome played any part in Ross's decision making, the trial court noted that "Ross has indicated that he would take a life sentence today if it were available and spend the rest of his life in prison, as long as no further penalty hearings would be required." *Id.* at 18; T. 4/7/05 at 83.

Finally, the most compelling reason why the trial court's competency finding is not "clearly erroneous" and, therefore, must be upheld on appeal is that the question of Michael Ross's competence effectively boiled down to a choice between two conflicting sets of psychiatric opinions, a choice resting exclusively within the domain of the trial court judge who heard the testimony. Essentially, all four psychiatrists have diagnosed Ross with three distinct disorders recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"): (1) sexual sadism; (2) depression or mood disorder not otherwise specified; and (3) personality disorder. Mem Dec. at 9; T. 4/7/05 at 32-33, 37; T. 4/11/05 at 27, 47; T. 4/12/05 at 35-37; T. 4/13/05 at 22, 54. Furthermore, all four experts agree that the more serious two disorders, sexual sadism and depression, are in remission or adequately treated with

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[11](...continued)
living in "solitary confinement." T. 4/11/05 at 42, 53. Dr. Gentile testified that Ross is not in solitary confinement, which would involve "very little human contact," T. 4/12/05 at 28, 49, and that Dr. Grassian's definitions of segregated confinement and solitary confinement "seem to blend into each other in what he's written or what he says." Id. at 49. Dr. Gentile also testified that she was familiar with solitary confinement because of her experience while in the Air Force with pilots who were prisoners of war and subject to real solitary confinement. Id. at 133. In other words, Dr. Grassian misused the term.

medication. However, two of the psychiatrists, Dr. Norko and Dr. Gentile, opined that none of Ross's disorders, either alone or in concert, substantially affect his competency or his ability to make a voluntary choice among his legal options. T. 4/7/05 at 48, 86; T. 4/12/05 at 47-48. Conversely, the other two psychiatrists, Dr. Grassian and Dr. Goldsmith, opined that Ross's decision is involuntary based on his "malignant" narcissistic personality disorder. T. 4/11/05 at 104; T. 4/13/05 at 54, 96-97.

After thoroughly reviewing the medical evidence, the trial court found that the opinions of Dr. Norko and Dr. Gentile were "more persuasive" than those of the other two psychiatrists. Mem Dec. at 11, 19, 21. In deciding to credit Dr. Norko and Dr. Gentile, the trial court relied on the following evidence:

> Norko, presently chief of forensic services of the Whiting Forensic Division of the Connecticut Valley Hospital, evaluated Ross for competency in 1995 when the defendant desired to represent himself and accept the death penalty. Norko found then that Ross understood his choices, effectively described his reasoning process, was coherent and logical, understood his legal situation and was clearly capable of representing himself. He found that Ross was capable of making choices and that it was Ross' moral decision to accept the death penalty to save the families of the victims the pain of further hearings. Norko, at this Court's request, in December, 2004 evaluated Ross again concerning his competency to waive any further appeals, and concluded that he was competent to make such a decision. Norko noted that Ross' reasons were the same in 1995, in that he was concerned for the families' pain of enduring another penalty hearing, and also recognized the small chance of success he would have at any penalty phase proceeding. Norko did note more anxiety in Ross in 2004 and also felt Ross' decision was more sober at this time. Ross' decision was more intellectual in 1995, and in the 2004 evaluation, Norko noted that it was more spiritual and moral. In 1995, Ross indicated, as he does now, that it is morally right to save the victims' families from another penalty hearing. Ross recognizes that there would be minimal return by having another penalty phase hearing, since he is convinced the result would be the same. Ross has not been unambivalent, but has weighed all the factors in making this decision. . . . Norko and Gentile agree that Ross is narcissistic and that his ability to empathize is impaired. . . . Nevertheless, his spirituality has grown over the years on death row and he has sought out religious

> advice concerning his decision. According to Norko and Gentile, none of Ross' mental disorders have a substantial effect on his ability to make rational choices. His personality disorder does not affect his ability to choose among his options. . . . Norko opined based on his evaluations in 1995, 2004 and 2005 that Ross' decision has been voluntary. Gentile testified that Grassian overstated Ross's narcissism and she disagreed that there is evidence of rage in Ross, other than the crimes themselves that took place over twenty years ago. Both Norko and Gentile agree that within a reasonable degree of medical probability Ross has no mental disorder that substantially affects his competency or his ability to make a knowing, intelligent and voluntary decision. As Norko noted in his evaluation of 2005, "Mr. Ross does not want to die. He sees dying as the cost of doing the right things." (State's exh. #6, p. 33).

Mem Dec. at 20-21.

Conversely, the trial court reasonably could have discredited the opinions of Dr. Grassian and Dr. Goldsmith. For example, in concluding that Ross is not mentally competent, Dr. Grassian "discount[ed] entirely" Ross's spiritual beliefs as a basis for his decision to accept his punishment and opined that Ross's religious beliefs are "a fraud" and merely narcissistic posturing. T. 4/11/05 at 117-19. The trial court disagreed, however, finding that Ross's "spirituality has grown over the years on death row and he has sought out religious advice concerning his decision." Mem Dec. at 20; T. 4/7/05 at 28-29. The trial court reasonably could have rejected Dr. Grassian's opinion regarding Ross's religious motivation behind his decision because it was contradicted at the competency hearing by virtually every other witness.[12] Moreover, Dr. Grassian was unable to

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[12] Dr. Goldsmith testified that Ross has experienced a "spiritual evolution," that his spiritual faith is strong, that Ross has "real spiritual beliefs," and that Catholicism is "a very important part of his life. He was always a religious person. After his arrest he became more . . . immersed in religion and took up the Catholic faith." T. 4/13/05 at 51, 137. Dan Ross testified that Ross is very religious, and his faith and spirituality have grown intensely over the past ten years. T 4/8/05 at 15. Susan P. testified that Ross is "a devout Catholic. He has a spiritual routine [] every day and he's very spiritual." T. 4/9/05 at 27, 81-82. Dr. Norko testified that when Ross discusses his spirituality now, as compared to 1995, "he actually changes in demeanor. When you enter into those (continued...)

reconcile his opinion with Ross's efforts to determine from two Catholic bishops and three separate priests who are experts in Catholic apologetics whether, under Canon law, his decision constituted a "mortal sin." T. 4/7/05 at 50-51, 150-51.

In addition, the trial court reasonably could have discredited Dr. Grassian's opinion that Ross has no empathy for the victims of his horrific crimes.[13] Even those testifying that Ross is incompetent disagreed with Dr. Grassian's absolutism about Ross's empathetic capacity. Dr. Goldsmith testified that, as far back as 1987, Ross "expresses concern for the victims frequently throughout the records that I reviewed, letters, medical entries that talk about it," and that Ross has said repeatedly that he wants to do the right thing. T. 4/13/05 at 110, 144. Martha Elliot testified that Ross has been saying he wishes to spare the families "from day one," and after seeing Elliot's first article that Ross wants to die, he wrote to her and said he doesn't want to die but rather, he feels he has a moral obligation to make this decision. T. 3/24/05 at 50. Elliot further testified that Ross has been "consistent" in his feelings of guilt and his belief that it is a greater

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[12](...continued)
discussions with him now, there's a different quality about him. There seems to be more of a calm or peaceful sense about him. I think it feels more genuine and it's in this area of describing his spiritual beliefs that they most connect with the moral decision." T. 4/7/05 at 42-43. Dr. Gentile described Dr. Paul Chaplin, a prison psychiatrist, and Mr. Latier's observations that Ross is very involved with religion, and "they believed that he was trying to regain a better moral sense of himself and to have more spiritual and religious life." T. 4/12/05 at 21-22.

[13] As support for his opinion that Ross has no empathy, Dr. Grassian stated that he questions "how does empathy make sense, you know? How many people who become serial murderers and rapists are capable of significant empathy? I mean, if you're capable of significant empathy, you can't do that kind of stuff." T. 4/11/05 at 24. Dr. Grassian also stated that Ross said he "get[s] really angry when people think [he's] stupid, which is narcissistic. That's narcissistic injury and the inability to tolerate it." *Id.* at 25. Dr. Grassian also testified that "you can't get empathy with anyone else until you've been able to make a fearless moral inventory of your own failings and inadequacies." *Id.* at 160.

wrong to put the families through another hearing, dating back to her first article for the Law Tribune. *Id.* at 51-2. Elliot also testified that numerous times throughout the Walking With Michael series Ross mentioned his desire to spare the families further pain. *Id.* at 140. Susan P. testified that Ross repeatedly told her that he is upset about the pain he has caused and what he did to the victims and wanted to spare the victims' families further pain. T. 4/9/05 at 21-22, 39, 49, 67-74.

Finally, the trial court reasonably could have discredited the medical opinion of Dr. Grassian because his motives were questionable at best. Dr. Grassian made his viewpoint quite clear that anyone, regardless of his or her mental state, who chooses to accept the death penalty is *per se* incompetent. In fact, Dr. Grassian testified that the decision to forgo the appeals *in itself* is proof that Ross is not competent. Dr. Grassian testified that a mentally healthy person would not like to sit through a penalty hearing, and "they would dread each one. But they certainly wouldn't give up their appeals." T. 4/11/05 at 121. When asked his opinion about Ross's legal options, Dr. Grassian stated that he doesn't know the viability of his options, but "[w]hat I do know, of course, is that people who are desperate to live grasp onto any hope, any chance to live. People with far less, you know, than a good chance will grasp onto that chance because they want to live. They hope that's all they have left is their hope. This chemotherapy's gonna work." Id. at 122. This opinion could be rejected because it is contrary to Connecticut law. *The Stamford Hospital v. Vega*, 236 Conn. 646 (1996).[14]

[14]In rejecting the public defender's proffer submitted in connection with Judge Clifford's initial competency finding, this Court likewise concluded that "much of the proposed testimony by many of the witnesses is conclusory in that it suggests that the defendant's decision to take (continued...)

Likewise, the trial court reasonably could have discounted Dr. Goldsmith's opinion. Dr. Goldsmith frankly admitted that he is against the death penalty. T. 4/13/05 at 141-143. Dr. Goldsmith also testified that he only asked the doctors from the Department of Corrections and Ross what their views were on the death penalty at the outset of speaking with them, but did not ask any other individuals what their beliefs were. T. 4/13/05 at 73.[15] Dr. Goldsmith diagnosed Ross with a "malignant or pathological" narcissistic personality disorder. T. 4/13/05 at 54, 96-97. Dr. Gentile testified that the diagnoses of "malignant or pathological" narcissistic personality disorder is beyond what is agreed upon as a consensus by the mainstream of psychiatry, and the word "malignant" is "not a word that we would commonly use to describe a personality disorder." T. 4/12/05 at 37-38. Dr. Goldsmith admitted that "malignant" narcissistic personality disorder is not in the DSM, but then stated that "malignant narcissism is very well described by a severe narcissistic character pathology under DSM language." T. 4/13/05 at 97.

In addition, Dr. Goldsmith testified that Ross made the decision to forgo further appeals in 2003, without reconciling that time frame with the fact that Ross attempted to stipulate in 1995, and had began discussing forgoing appeals as early as 1987. T. 4/13/05 at 58-60. Dr. Goldsmith

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[14](...continued)
control of his life by forgoing further legal challenges to his death sentences and his ambivalent feelings over the consequences of that decision are, in and of themselves, evidence of his incompetence. We see no basis for that proposition in logic, experience or the law." *State v. Ross*, 272 Conn. at 611.

[15] Dr. Grassian would not share his opinion about the death penalty, and testified that he does not take a "strong public stance" on the death penalty "to preserve myself as an expert on these issues." T. 4/11/05 at 168. Both Dr. Grassian and Dr. Goldsmith testified that they would not be asked to evaluate those inmates who were not choosing to forgo their appeals. T. 4/13/05 at 166-167; T. 4/11/05 at 58. In other words, if Ross chose to pursue his appeals, no one would question his competence.

also testified that Ross's 2003 suicide attempt was a "very lethal, potentially lethal suicide attempt." *Id.* at 52. The only evidence that Ross really attempted suicide, however, was Ross telling a spiritual advisor that it occurred. T. 4/7/05 at 51. There was no medical record of this attempt. Dr. Goldsmith also testified that the fact that Ross feels bad that he did not support his college girlfriend when she was pregnant is evidence of narcissism, T. 4/13/05 at 47-48, and Ross's hope that his decision to accept his sentence might help the families is likewise evidence of narcissism. Id. at 158-159. Dr. Goldsmith totally discounted Ross's ability to form an opinion about how his victims' families would react, despite direct evidence that Ross followed their statements in the news media. T. 4/7/05 at 41, 122.

In sum, the trial court in this case properly evaluated the expert testimony, assessed its credibility, assigned it a proper weight and, above all, resolved the conflicting opinions about whether Ross's mental disorders substantially affect his ability rationally to choose to forgo further review of his death sentence and accept his punishment. The fact that the court credited the testimony of Dr. Norko, an independent-court-appointed psychiatrist, further reinforces the court's finding, as does its decisions not to apply a presumption of competency or to place a burden of proof upon special counsel or either party. *See Smith v. Armontrout*, 812 F.2d at 1058. Moreover, Ross himself testified at the competency hearing, and for more than a decade now he has repeatedly articulated his desire to end his appeals and accept his punishment in order to spare the victims' families further pain and suffering. The trial court also had the opportunity to observe Ross many times since October 4 and interact with him on more than one occasion. In short, the trial court had before it ample medical opinion and other evidence that Michael Ross's mental disorders do not substantially interfere with his ability to understand his legal options or

rationally to chose among them. Accordingly, the trial court's decision is not "clearly erroneous" and must be upheld on appeal.

II. BECAUSE SPECIAL COUNSEL PRESENTED NO EVIDENCE OF EXTERNAL COERCION, SPECIAL COUNSEL'S CHALLENGE TO THE TRIAL COURT FINDING OF VOLUNTARINESS IS NOT SUBJECT TO *DE NOVO* REVIEW.

Special counsel claimed in its Motion for Appointment as Special Counsel for Purposes of Appeal, that the "trial court determination that the defendant in this capital case has voluntarily waived his right to seek post-conviction relief ... is subject to *de novo* review in this Court." Motion for Appointment at 1, 4-5; *see* Writ at 3. This claim might have merit if special counsel raised a claim of error arising from the trial court's resolution of an allegation that Ross's decision is the product of external coercive forces, such as prison conditions. That cannot occur, however, as special counsel failed to put into issue the factual predicate for external coercion. Instead, special counsel presented evidence only of mental diseases and disorders which were claimed to have compelled Ross's conduct. Although such internal processes properly are a part of the competency inquiry, the trial court's findings about those subjects are reviewable as findings of fact.

The voluntariness findings that are subject to *de novo* review require evidence of external coercion. *See Colorado v. Connelly*, 479 U.S. 157, 165-66, 107 S.Ct. 515 (1986) (where defendant claimed that driven by "voice of God" to confess, due process clause requires state misconduct coercing or overbearing the will before confession excluded as involuntary). Although the defendant's psychological makeup is relevant to the voluntariness inquiry subject to *de novo* review; *see Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973),[16] psychological disabilities

[16]The Supreme Court stated: "In determining whether a defendant's will was over-borne (continued...)

cannot alone vitiate voluntariness – the issues of mental health must be analyzed in the context of some external coercive force. *Colorado v. Connelly*.

Special counsel did not rely on external coercion to demonstrate involuntariness. It argued in its "*Special Counsel's Pre-Hearing Memorandum of Law,*" at 6-7, that the "knowing, intelligent and voluntary" inquiry includes consideration of "impaired self-determination" or internal mental coercion and that the principal focus of his argument would be the "voluntary" aspect, not the "knowing and intelligent" aspect. Pre-hearing Mem at 6-7. Although the "re-opened" competency hearing was predicated on an expectation that special counsel would offer evidence that the conditions of confinement coerced Ross's decision,[17] the trial court found that "[t]he much anticipated 'death row' syndrome or 'segregated housing unit' syndrome never materialized in this

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[16](...continued)
in a particular case, the Court has assessed the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep. In all of these cases, the Court determined the factual circumstances surrounding the confession, assessed the psychological impact on the accused, and evaluated the legal significance of how the accused reacted." (Internal citations and footnote omitted). *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

[17] In some federal courts, "voluntariness" has involved an inquiry into the coercive effects of prison conditions on the mental health of the death row inmate. *See e.g., Comer v. Stewart*, 215 F.3d 910, 917-18 (9th Cir. 2000) (decision to waive involuntary if results from duress, including conditions of confinement); *Smith v. Armontrout*, 812 F.2d 1050, 1058-59 (8th Cir. 1987) (reviewing for error district court's determination on whether petitioner's particular conditions of confinement rendered his decision to waive appeals involuntary), *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277 (1987); *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 961 (M.D. Tenn. 1984) ("In the judgment of this Court, the conditions of confinement inflicted on Mr. Harries are so adverse that they have caused him to waive his post-conviction remedies involuntarily."). As stated in Section I, supra, this Court applied *Rees* and not derivatives crafted by circuit courts that this Court is not obligated to follow. *See* Issue III, *infra.*

case." Mem. Dec. at 15. The trial court specifically asked Dr. Goldsmith whether he "claimed or testified in any shape or form that the prison conditions in and of themselves have affected his decision." The witness answered "No." T.4/13/05 at 159-60. Dr. Goldsmith testified that prison conditions were but

> one stressor that he has to cope with and that that causes him distress to the extent that he's vulnerable to succumb to feelings of hopelessness, that the conditions of confinement are so harsh for him that if he's not able to cope with it in keeping busy, that he can fall into this feeling of hopelessness about the future. And so when events, other events happen, like his girlfriend leaving him, it's so – more painful to him, because there's no other alternative. Now he's faced with this awful life on death row and it becomes more of a factor for him. So it's one factor.

T. 4/13/05 at 159. Consistent with that testimony, special counsel in closing argument did not argue that conditions of confinement coerced the defendant into electing to forgo collateral challenges to his convictions and sentences; rather, he argued that the defendant's narcissistic personality disorder caused him to so elect. See T.4/14 at 57-74. Although counsel did argue that restrictions imposed by that confinement constituted a "narcissistic insult"; see e.g. T.4/14 at 60, 62; the prison conditions were but one of many "insults" to his narcissistic personality that were argued to have driven him to elect to forgo further challenges. Under the facts of this case, therefore, the internal coercion of mental disease or disorder, although relevant to the factual determination of the defendant's capacity to choose under *Rees*, can not constitute the external coercion sufficient to subject the trial court's findings to *de novo* review.

Notably, all but one of the cases relied upon by special counsel in its pre-trial memorandum simply state the proposition that the internal coercion of mental problems can render a decision involuntary, without discussing or attempting to distinguish *Colorado v. Connelly*. He cited one case, and the state has found no other, that discounts *Colorado v. Connelly* and rules that internal

coercion is sufficient and that voluntariness is reviewed *de novo.* In *Wilkins v. Bowersox*, 145 F.3d 1006, 1012 (8th Cir. 1998), a case involving waiver of counsel and of trial and the right to present mitigating evidence, the Eighth Circuit Court of Appeals rejected the state's argument that under *Colorado v. Connelly* the defendant's mental condition was not relevant to voluntariness absent evidence of coercive pressures. 145 F.3d at 1012. The court held that *Connelly* "pertains only" to voluntariness of confessions and the application of the exclusionary rule and cited *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), for the proposition that in the context of waiver of counsel, the defendant's background and personal characteristics are highly relevant to the validity of the waiver. 145 F.3d at 1012. *Wilkins* does not provide persuasive authority. First, the *Wilkins* Court did not review a waiver of election to forgo appeals, and does not even cite *Rees*. Second, nothing in *Colorado v. Connelly* limits its analysis, under the due process clause, to confessions. Third, in *Edwards,* the defendant's background and personal characteristics are highly relevant to whether a waiver is knowing and intelligent; the *Edwards* Court does not address those factors as relevant to voluntariness. Moreover, in *Wilkins*, the Eighth Circuit determined that the state trial court had not conducted a sufficient canvass on the defendant's waiver of counsel and a trial to determine if it was knowing, intelligent and voluntary. Here, the trial court's thorough inquiry into whether Ross's decision was knowing, intelligent and voluntary is not challenged.

III. THIS COURT SHOULD NOT HAVE TO REHEAR A CASE THAT IT ALREADY HAS DECIDED CORRECTLY.

Indisputably, the saga of *State v. Michael Ross* has traveled a remarkable and troubled route. Indeed, it is ironic that one reason special counsel has asked for this Court’s review is to

ensure that any final ruling is treated with deference in federal courts. Motion for Appointment as Special Counsel at p. 5. The case is back in this Court, however, because the very opposite occurred: no deference was given to this Court's decision in *State v. Ross*, 272 Conn. 577 (2005) (Writ I), by a particular federal district court which, acting outside of its judicial role, also ignored the fact that this Court's ruling was upheld by the United States Supreme Court in *Lantz v. Ross*, U.S. , 125 S. Ct. 1117 (January 27, 2005). Those events triggered the second hearing before the trial court despite several levels of litigation in which every court ruled that no such hearing was necessary.

Faced with an unprecedented and unconstitutional set of events that returned the case to it, the trial court undertook a creative and liberal approach to the second hearing. However, in its effort to resolve the questions arising from the events that halted the execution, the court ruled that this was a new proceeding and that it was not bound by the law or the facts established by the final judgment in *State v. Ross*, 272 Conn. 577. T. 4/7/05 at 6-10, 14. Although its ultimate conclusion, that Ross is competent, was correct, the trial court's decision that it was not bound by prior proceedings was mistaken. Understanding why this case returned is important not only because it impacts on the sovereignty and integrity of this Court's judgment, but also because future trial courts facing a similar situation should understand that the factual findings and legal conclusions made in the original decision in a case such as *State v. Ross*, 272 Conn. at 577, that has been upheld by the United States Supreme Court, must control the outcome of any subsequent proceedings. *In re Application for Writ of Habeas Corpus of Dan Ross,* 272 Conn.

653 (2005) *(*prior competency finding res judicata in subsequent action); *State v. Ross*, 269 Conn. 213, 262 (2004) (previous decision of Court in same case is law of the case).

A. All of this Court's Primary and Subsidiary Rulings in *State v. Ross* were Affirmed by the United States Supreme Court and Thus Became Binding on State and Federal Courts with Jurisdiction Over this Matter.

Federal courts have authority to "interfere with the course of state proceedings only in specified circumstances." *Demosthenes v. Baal*, 495 U.S. 731, 737 (1990). "Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power." That limitation of federal power vis-a-vis criminal convictions is codified in 28 U.S.C. § 2254 which limits federal oversight of state court decisions and, among other things, directs federal courts to accord a presumption of correctness to state court rulings on federal constitutional issues. One of the issues entitled to the presumption of correctness is a state court's finding that an inmate is competent to waive appeals in a capital case. *Demosthenes v. Baal*, 495 U.S. at 735.

In *State v. Ross*, 272 Conn. at 598-602, 611, this Court ruled that no meaningful new evidence was presented by a purported "next friend" to justify a full evidentiary hearing into the defendant's competency. "The issue of Michael Ross' competence was not only essential to [that] determination, but formed the basis of the controvers[y] in that proceeding." *In re Application for Writ of Habeas Corpus by Dan Ross*, 272 Conn. 653, 666 (2005). Two important subsidiary issues were also resolved in *State v. Ross:* 1) Ross's competency to waive post conviction remedies had to be evaluated under the standards set forth in *Rees v. Peyton,* and 2) the hearing establishing that Ross was competent satisfied his due process rights under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986). *State v. Ross*, 272 Conn. at 604. Thus, unless these rulings

fell within an exception set forth in § 2254, they should be presumed correct and should not be disturbed by a federal court hearing the same matter.

In the federal habeas hearing before the district court, *Chatigny, J.*, however, the presumption of correctness was not applied. *Ross v. Lantz,* 2005 U.S. Dist. LEXIS 908*.* Specifically, the district court believed that the procedure employed by the trial court was insufficiently adversarial, that this Court's efforts to correct any procedural irregularity by eliciting an offer of proof from the public defenders was impermissible, that there was meaningful new evidence, in the form of expert testimony from Dr. Grassian, that Ross's decision to forgo his appeals was involuntary due to the conditions of his confinement; and that neither the trial court nor this Court correctly analyzed the voluntariness of Ross's action under the appropriate test for competency. *Id.* at 8. The district court insisted on imposing a competency standard on the state that was more demanding than *Rees v. Peyton*. It was the district court's view that this Court should have applied the test set forth in *Rumbaugh v. Procunier*, 753 F. 2d 395 (5th Cir. 1985), cert denied sub nom. *Rumbaugh v. McCotter*, 473 U.S. 919 (1985) *and Smith v. Armontrout*, 812 F. 2d 1050, 1057 (8th Cir 1987) *(*The *Rumbaugh/Smith* analysis in Judge Chatigny's vernacular*).* T. 1/24/05 at 22; *Ross v. Rell*, 2005 U.S. Dist. LEXIS 908 at 5. For these stated reasons, the district court granted a stay so it could hold an adversarial competency hearing using the more demanding standards.

The state challenged this stay and it ultimately was vacated by the United States Supreme Court. *Lantz v. Ross*, U.S. , 125 S. Ct 1117. Due to the issues litigated in the Supreme Court and the way federal habeas corpus review operates, *Lantz v. Ross* overturned not just the stay,

but the underlying rationale of the district court. Pursuant to § 2254 (d), federal courts must defer to a state court's ruling on federal constitutional issues unless it is contrary to, or involved an unreasonable application of, United States Supreme Court precedent, or it is an unreasonable determination of facts in light of Supreme Court precedent. 28 U.S. C. § 2254 (d). In other words, this Court is bound only by the United States Supreme Court and not by the decisions of federal circuit courts.

Therefore, the Supreme Court's decision in *Lantz* effectively held that the procedure used by this Court and Judge Clifford to determine that Ross was competent in the first writ satisfied due process, that *Rees* was the proper standard to determine Ross's competency and that this Court was correct when it ruled that Ross was competent. See, *Ross v. Rell* , 398 F. 2d 203, 205 (2d Cir 2005)("We note, moreover, that. . . the implications of the Supreme Court's one-sentence order vacating the stay in *Lantz v. Ross* leave little room to argue to this Court in this appeal that Michael Ross is incompetent for these purposes"). Had the federal court adhered to its proper role in habeas corpus litigation this would have been the end of the matter. Unfortunately, the district court did not confine itself to the constitutional parameters described above. Thus, the case returned to state court.

Even that unprecedented result, however, does not mean that everything had to be repeated, and it certainly provides this Court with the opportunity to reassert its original ruling. The case of *United States v. Sanchez-Velasco*, 287 F. 3d 1015 (11th Cir. 2002), provides a useful model for how the state trial court, or at minimum this Court, can reestablish the proper balance between federal and state courts that was compromised here.

In *Sanchez-Velasco,* a lawyer from the Florida office of the Capital Collateral Regional Counsel (CCRC) filed a habeas corpus petition without the named party's permission. *Id.* at 1017. The unwilling petitioner responded by filing a pro se motion to dismiss the unauthorized petition. The district court granted the lawyer limited standing to pursue the issue of whether Sanchez-Velasco was competent as a prerequisite for deciding the motion to dismiss. *Id*. After appointing an expert to examine the respondent and holding an evidentiary hearing, the Court ruled that Sanchez-Velasco was competent and dismissed the petition. *Id.* at 1017-1018. Although the Court of Appeals "had no fault with the district court's conclusion that Sanchez - Velasco is mentally competent to decide his own fate, [it] disagree[d] with the court's ruling that [the attorney] and CCRC, who are strangers to Sanchez-Velasco, have limited standing to challenge his mental competency." *Id.* The Court ruled that the district court erred when it held an evidentiary hearing "after state courts had already decided the issue." *Id.* "The district court failed to give the state court's determination that Sanchez-Velasco was mentally competent . . . the presumption of correctness." *Id. at* 1030; citing *Demosthenes v. Baal*.

So too here. Although the trial court reached the right result in the second hearing, it should have deferred to *State v. Ross*, 272 Conn. 577, for the facts and the law to be applied. In other words, there was no need for another hearing. If, however, something justified such a hearing, the starting place should have been the prior finding that Ross was competent beyond a reasonable doubt and this Court's decision upholding that finding. The trial court was bound to presume that its previous conclusion was correct unless and until special counsel "clearly and convincingly establish[ed] that the [previous] finding was erroneous when made, or . . .that even though the

[previous finding] was correct when made the mental condition of the inmate has deteriorated to the point that he is no longer mentally competent." *United States v. Sanchez-Velsaco*, 287 F. 3d at 1032.

As to the former, the evidence at the second hearing showed that this Court's decision in *State v. Ross*, 272 Conn. 577, coming after it reviewed the public defender's offer of proof, remains unassailable. As for the latter, the state always has acknowledged that a serious change in condition could warrant a second look. No such claim was made below and Ross's mental condition actually has improved between January 28 and April of 2005. T. 4/13/05 at 62.

Finally, the trial court justified its decision to start on a clean slate in the second hearing because the prior case adjudicated "next friend" status whereas this hearing was initiated by Attorney Paulding, who now conceded that an additional assessment of Ross's competency was necessary. T. 4/7/05 at 4,5. Admittedly, there is support for this distinction. *Compare, United States v. Sanchez Velasco*, 287 F. 3d 1015 (Petition filed without notice or permission of named party); *O'Rourke v. Endell*, 153 F. 3d 560, 567 (8th Cir. 1998) (Petitioner challenges validity of competency hearing and joins an uninvited litigator's effort to reopen hearing). The Court in *Endell* "carefully distinguish[ed] between actions taken by the defendant personally and those taken by [the lawyer] without the defendant's consent." *State v. Ross*, 272 Conn. at 606 n. 14 (citing *O'Rourke v. Endell*, 153 F. 3d at 567.)

In this case, however, the defendant also was bound by the law of the case. He fully litigated his competency in the first writ of error and, as confirmed by the United States Supreme Court,

that hearing complied with due process. Absent compelling new evidence casting a substantial doubt on Ross's competency at that time, there was no need for a second hearing on that issue.

B. The Evidentiary Hearing Eliminated Attorney Paulding's Conflict.

The state concedes that the second hearing employing special counsel served a useful purpose under the extraordinary facts of this case. As a result of special counsel's thoughtful and thorough approach, the trial court's ruling had the effect of eliminating Attorney Paulding's conflict. The hearing operated in the same manner as a habeas corpus petition claiming ineffective assistance of counsel resolves that constitutional claim by analyzing whether a lawyer acted in a professional manner and, if not, whether any deficiency effected the outcome. *See Strickland v. Washington*, 466 U.S. 668 (1984). The decision produced by Judge Clifford confirms that, contrary to the district court's assertions and consistent with this Court's and Judge Droney's finding, Attorney Paulding acted in a professional manner when he exercised judgment in the first Writ and decided that the various aspersions cast on Ross's competence were without merit. The hearing also proved, contrary to the concerns of the district court, that even assuming Attorney Paulding's efforts fell below professional standards, his decision not to employ Dr. Grassian and Dr. Goldsmith and unleash their theories on the trial court, had no effect on the outcome. This eliminates any concerns raised by the district court's conduct and frees Attorney Paulding to represent his client in the same ethical manner he has displayed throughout this process. Now that any hint of conflict has been eliminated, however, the time has come to let him act on behalf of his client unburdened by well meaning but unnecessary legal assistants.

The hearing would not have been needed for this purpose, however, if the district court had adhered to its proper role as a federal habeas court. In response to that, this Court should simply reaffirm its ruling in *State v. Ross*, 272 Conn. 555, as upheld in *Lantz v. Ross*, U.S. , 125 S. Ct 1117.

CONCLUSION

If this Court reaches the merits of this consolidated matter, the trial court's ruling should be affirmed.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies that this brief complies with all provisions of Connecticut Rules of Appellate Procedure 67-2.

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